

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

In re the Marriage of :

JULIE LE-FEDDEMA, n/k/a JULIE LE,

Respondent,

v.

PAUL A FEDDEMA,

Appellant.

No. 33267-1-II

UNPUBLISHED OPINION

VAN DEREN, J. — Paul A. Feddema appeals the trial court’s denial of his motion to vacate a modified parenting plan and award of attorney fees following trial. He argues that because he did not receive proper notice of the trial date he was deprived of his due process rights under the state and federal constitutions. We affirm.

**Procedural Background**

When Julie Le and Paul Feddema were divorced, they executed a parenting plan for their one child. In October 2003, Le filed notice with Clark County Superior Court that she wished to relocate to California with the child. Feddema, who was on assignment with the military,

accepted service of the notice to relocate but objected in writing to the relocation and moved the court for a temporary order restraining relocation. Feddema listed his address as “9717 NE 138th Court, Vancouver, WA 98682.” Clerk’s Papers (CP) at 4. Feddema received personal service of documents at this address, his parents’ house, on a number of occasions.

For the next several months, Feddema actively participated in the litigation of Le’s relocation action, appearing at court hearings and filing numerous pleadings. On March 16, 2004, Feddema filed a “Summons--Modification of Parenting Plan” and a “Notice of Hearing for Adequate Cause Determination & Motion for Temporary Order,” both listing a post office box and his parents’ address.<sup>1</sup> CP at 279-80. Only the notice of hearing, however, stated that the post office box was his mailing address.

On March 31, 2004, Feddema filed a “Motion for Order Re: Allowing Visitation for Spring Break,” listing only his parents’ address under his signature. CP at 178. The only document on record that specifies the post office box as Feddema’s mailing address was his March 16, 2004, “Notice of Hearing for Adequate Cause Determination & Motion for Temporary Order.” CP at 280.

Under Civil Rule (CR) 40 and Clark County Local Rule (LR) 40,<sup>2</sup> Le filed a “Notice to

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<sup>1</sup> Feddema listed four different addresses during the course of the litigation.

<sup>2</sup> Clark County does not require a hearing to set trial unless a party objects to another party’s “notice to set for trial.” Clark County LR 40(b).

Set for Trial and Statement of Arbitrability” on July 19, 2004.<sup>3</sup> CP at 254. In that document, it appears that Le intended to provide the court with only Feddema’s parents’ address, but committed an important typographical error in the process. Rather than listing “NE 138th Court,” she listed “NE 137th Court.” CP at 255. Despite this error, Le’s attorney certified that all *pro se* parties were served a copy of the notice to set for trial and has asserted on several occasions that Feddema did, in fact, receive a copy of the notice.<sup>4</sup> The record does not indicate that Feddema denied receipt of Le’s July 19th, 2004, notice to set for trial.

The superior court set the case for trial on November 15, 2004, and sent a copy of the “Trial Setting Notice” in late August 2004 to the incorrect address listed in Le’s notice to set for trial. CP at 256-57. The notice was returned to the court as “not deliverable as addressed; unable to forward; return to sender.”<sup>5</sup> CP at 257. Le’s attorney sent Feddema a letter on November 9, 2004, reminding him of the impending November 15, 2004 trial.

The trial commenced on November 15, 2004, in Feddema’s absence. After Le testified, the trial court implemented two changes to the July 16, 2004, temporary parenting plan.<sup>6</sup> The

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<sup>3</sup> Feddema filed a proposed parenting plan on June 18, 2004, just four days before Le filed her notice to set for trial, Feddema also filed two declarations on July 15, 2004, regarding attorney fees and the entry of a temporary parenting plan. But between July 15, 2004, and trial, Feddema filed no documents with the court.

<sup>4</sup> The record contains a copy of a letter and a copy of the notice to set for trial that were sent by Le’s attorney to the correct NE 138th Court address.

<sup>5</sup> Feddema asserts that he sent an e-mail to Le’s attorney on July 31, 2004, notifying him that he would have a new address effective August 1, 2004. Le’s attorney denies receiving the e-mail.

trial court ordered a final parenting plan the same day. The following day, on November 16, 2004, the trial court awarded Le attorney fees. Le's attorney mailed Feddema a copy of the final papers following their entry and it is undisputed that Feddema is deemed to have received them by November 19, 2004. CR 54(f). Furthermore, Feddema does not deny receiving the final papers on November 19.

Although Feddema exercised his parenting time under the parenting plan from December 20, 2004, through January 3, 2005, and paid the attorney fees awarded to Le at trial before he filed his motion to vacate in January 2005, Feddema filed a motion to vacate both the trial court's parenting plan and its award of attorney fees on January 20, 2005. A hearing on the motion was held on February 23, 2005. On March 4, 2005, the trial court denied Feddema's motion in a letter to each party. Feddema filed a motion for reconsideration on April 14, 2005. On April 26, 2005, the trial court denied that motion.

Feddema appeals the trial court's denial of both his motion to vacate and his motion for reconsideration.

## ANALYSIS

### A. Notice of Trial Date

Feddema asserts that his absence at the November 15, 2004 trial was due to inadequate

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<sup>6</sup> One change stated that Le and Feddema would alternate the child's birthday as opposed to Feddema having visitation on her birthday every year. The other change stated that neither parent may employ a private investigator to survey or monitor the other parent without good reason.

notice of the trial date. Specifically, he argues that the trial court's notice setting trial was sent to his "in person" street address as opposed to his mailing address as specified in his March 16, 2004 pleading. Therefore, Feddema concludes, he was denied his right to due process.<sup>7</sup>

Le responds that (1) Feddema received a copy of her July 19, 2004 notice to set for trial; (2) it was Feddema's responsibility to notify the court that his address changed on August 1, 2004; (3) Feddema had actively participated in the litigation and should have inquired whether a trial date had been set; and (4) Feddema specified a "mail to" address in only one document filed with the court.<sup>8</sup>

Clark County LR 40(b)(4) states that, once determined, the court will give reasonable

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<sup>7</sup> Feddema also contends that the trial court mistakenly characterized its orders entered as a result of the November 15, 2004 trial as default judgments. Rather, Feddema argues, a trial was held in his absence. Feddema is correct. CR 55(a)(1) allows default judgment only when the party against whom default judgment is sought has failed to appear, plead, or defend his case. A party fails to appear, plead, or otherwise defend within the meaning of CR 55 if it fails to answer or to file any responsive pleading, or to challenge such matters as service, venue, and the sufficiency of prior pleadings. *Tacoma Recycling, Inc. v. Capitol Material Handling Co.*, 34 Wn. App. 392, 395, 661 P.2d 609 (1983). Feddema was not subject to default because he was not present when the case was called for trial. *Tacoma Recycling*, 34 Wn. App. at 395. CR 55(a)(3) requires that written notice of a motion for default and the motion's supporting affidavit be served on any party who has appeared in the action for any purpose before the hearing on the motion. Here, Feddema has actively participated in the litigation. Moreover, a trial may proceed in the absence of a party; CR 40(a)(5) removes the absence of a party as an impediment to trial. *Tacoma Recycling*, 34 Wn. App. at 394-95.

<sup>8</sup> Le concedes that the letter her attorney sent Feddema on November 9, 2004, reminding Feddema of the November 15, 2004 trial was irrelevant in analyzing whether Feddema received adequate notice of the trial date.

notice of the assigned trial date. Here, the court sent the notice setting trial to “9717 NE 137th Court,” the address Le provided in her notice to set for trial. CP at 255. Feddema’s correct street address at the time was “9717 NE 138th Court.” CP at 279. Therefore, the notice setting trial was sent to an invalid address. At a minimum, notice by mail must be sent to a valid address to which the party has at least some connection.<sup>9</sup> See *In re Marriage of McLean*, 132 Wn.2d 301, 309, 313-14, 937 P.2d 602 (1997). The debate between Feddema and Le regarding whether Feddema clearly specified a “mail to” as opposed to an “in person” street address is inconsequential given this error.

Further, Le’s argument that Feddema received a copy of her notice to set for trial does not change the result. Even if Feddema received a copy of this notice, that document does not specify a requested trial date. In *State v. Liden*, the defendant received a notice setting trial stating that his trial would occur the “Week of August 6, 2001.” 118 Wn. App. 734, 739, 77 P.3d 668 (2003). We held that this notice was insufficient because it did not inform the defendant of his exact trial date, even though the trial court’s practice was to call criminal trials

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<sup>9</sup> In her brief, Le asserts that Feddema knew of an imminent address change effective August 1, 2004, when he received a copy of Le’s notice to set for trial dated July 19, 2004, and that he should have notified the court of this address change to ensure that he received any related mail. Le’s contention ignores that the address change affected only Feddema’s street address, not his mailing address. In a July 31, 2004 e-mail to Le’s attorney--that Le’s attorney denies receiving--Feddema expressly notes that while his street address was to change on August 1, 2004, his mailing address would remain the same. In any event, the notice was sent to an entirely invalid address, rendering the notice insufficient.

on Thursdays. *Liden*, 118 Wn. App. at 740. Here, Feddema's alleged receipt of Le's notice to set for trial cannot be considered sufficient notice of the trial date where the document did not include a trial date.

Thus, Feddema did not receive reasonable notice of the trial.

#### B. Due Process Violation Remedy

Feddema unsuccessfully moved under CR 60(b)(1), (4), and (11) to vacate the trial court's orders following trial. On appeal, Feddema assigns error to the trial court's findings denying his motions to vacate and for reconsideration.<sup>10</sup>

The sole issue raised by Feddema on appeal is whether the lack of reasonable notice of the assigned trial date violated Feddema's constitutional rights to due process under both the Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution and whether this violation entitles him to a new trial, relieving him of a showing of due diligence or other basis under CR 60(b).

Due process requires that notice be reasonably calculated under all the circumstances to apprise a party of the pendency of proceedings and to provide an opportunity to be heard.

*McLean*, 132 Wn.2d at 309. Due process does not require any particular form or procedure; it

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<sup>10</sup> Feddema assigns error to the trial court's findings of fact supporting its denial of his motion to vacate, and to findings of fact five, six, seven, and eight denying his motion for reconsideration. Feddema's motion to vacate under CR 60(b)(4) requires a showing of fraud, which Feddema has not pleaded or argued, so we do not further consider it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (we will not consider assignments of error not supported by argument); *Diehl v. Mason County*, 94 Wn. App. 645, 651, 972 P.2d 543 (1999).

requires only that a party receive proper notice of proceedings and an opportunity to present its position before a competent tribunal. *Rivers v. Wash. State Conf. of Mason Contrs.*, 145 Wn.2d 674, 697, 41 P.3d 1175 (2002). When a notice setting trial is mailed to a valid address, due process is satisfied even if the mail is returned unclaimed or refused. *See McLean*, 132 Wn.2d at

312-13. Proof of the addressee's actual receipt of notice sent by mail is unnecessary. *McLean*, 132 Wn.2d at 309. Because we hold that Feddema did not receive actual notice of the trial date, his due process rights were abridged.

Feddema and Le disagree on the proper remedy for this due process violation. Feddema filed a motion to vacate the trial court's rulings based on the lack of proper notice. This remedy was appropriate. *See Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 307-08, 122 P.3d 922 (2005). Feddema's motion recognized, and we reiterate, that the decree was voidable, but not void under these circumstances. *See In re Marriage of Chai*, 122 Wn. App. 247, 253-56, 93 P.3d 936 (2004) (where notice of filing a motion to convert a decree of separation to a decree of dissolution was insufficient, an order granting the motion is voidable and may be vacated if the motion to vacate is brought within a reasonable time and if the grounds asserted are mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining the order).

We overturn a trial court's decision to deny motions to vacate and motions for reconsideration only if the trial court abused its discretion. *Rivers*, 145 Wn.2d at 685. A trial court abuses its discretion when its decision is based on untenable grounds or untenable reasons. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 309-10, 989 P.2d 1144 (1999).

A successful motion to vacate requires that the moving party show:

(1) substantial evidence supports at least a prima facie defense to the claim asserted by the opposing party; (2) the moving party's failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) the moving party acted with due diligence after notice of the default judgment; and (4) the opposing party will not suffer substantial hardship if the default judgment is

vacated.

*Topliff*, 130 Wn. App. at 308 (citing *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968)).

In *Topliff*, the Chicago Insurance Company (CIC), a foreign insurer, had no notice of a lawsuit filed in Washington, was defaulted, and a judgment entered against it when the insurance commissioner, the designated agency for service, failed to forward the process. *Topliff*, 130 Wn. App. at 304-05. CIC moved to vacate the default judgment in favor of their insured under CR 60(b). *Topliff*, 130 Wn. App. at 304. The trial court granted the motion under CR 60(b)(11) on due process grounds. *Topliff*, 130 Wn. App. at 304. Division III of this court affirmed because “[A]ny mistake, inadvertence, neglect, or irregularity rest[ed] solely with the insurance commissioner. . . .The extraordinary circumstances deprived CIC of an opportunity to respond to the Topliffs’ suit.” *Topliff*, 130 Wn. App. at 305.

Under CR 60(b)(1), a party must make a motion “within a reasonable time” and must show that an order should be vacated for “[m]istakes, inadvertence, surprise, excusable neglect or irregularity . . .” CR 60(b)(1). Feddema has shown that a mistake occurred because he did not receive notice from the trial court of the November 15 trial date.

The period between the moving party’s awareness of the judgment and the filing of the motion to vacate is the critical period in determining whether a motion to vacate is brought within

a reasonable time under CR 60(b). *Luckett*, 98 Wn. App. at 312. Other considerations to determine a motion's timeliness are: (1) prejudice to the nonmoving party, (2) whether the moving party has good reasons for failing to take appropriate action sooner, (3) the interest in finality, (4) the reason for the delay, and (5) the practical ability of the litigant to learn earlier of the grounds relied on. *Luckett*, 98 Wn. App. at 312-13.

Here, Feddema learned that a trial had occurred and that Le's requested relocation had been granted with minor modifications from the temporary plan, along with attorney fees, by November 19, 2004, just three days after the trial concluded. This was within the 30-day appeal period but Feddema did not appeal the trial court's decision. RAP 5.2(a). Instead, he waited two months, saw his daughter under the modified parenting plan schedule over the Christmas break, and paid the attorney fees awarded to Le before filing his motion to vacate the orders in late January 2005.

Under these circumstances, we hold that the trial court did not err in finding that Feddema failed to demonstrate due diligence in moving to vacate the final parenting plan and attorney fees order. Addressing the other considerations in determining a CR 60(b) motion's timeliness, the prejudice to Le is clear—she has resided in California with the parties' child for over two years and she is enrolled in school and is employed there. There is also a strong interest in finality because the case deals with the parenting plan for a child who is enrolled in school in another state. Although Feddema learned of the November 15, 2004 trial only days after it occurred and

has himself lauded his “extraordinary commitment” to this litigation, he failed to file his motion to vacate until late January 2005. Br. of Appellant at 6. And Feddema offered no good reason for his delay in bringing this matter before the trial court. So although Feddema can satisfy the excusable neglect prong of a motion to vacate under CR 60(b)(1), unlike CIC, he cannot demonstrate due diligence, lack of substantial prejudice, or substantial evidence of a prima facie defense to Le’s relocation request.

Civil Rule 60(b)(11) may provide a basis of relief from an order for any just reason but it is both narrowly construed and applied. *See Topliff*, 130 Wn. App. at 305. Unlike CIC in *Topliff*, Feddema knew about the litigation and resisted Le’s relocation to California with their child. But the trial court allowed her to relocate with the child months before the trial after hearing and considering Feddema’s objections. The final parenting plan made only minor changes in the temporary plan that had allowed Le and the child to relocate. Feddema learned of the trial results within three days of the trial. He followed the parenting plan through Christmas and he paid the attorney fees the trial court ordered. The extraordinary circumstances warranting relief to CIC under CR 60(b)(11) do not exist here and therefore the trial court did not abuse its discretion in denying Feddema’s motions under CR 60(b)(11).

Thus, his claim that the orders should have been vacated fails.

#### C. Attorney Fees

Both parties request attorney fees under RAP 18.1 and RCW 26.09.140. An award of

attorney fees and costs associated with an appeal may be granted under RCW 26.09.140. *In re Marriage of Muhammad*, 153 Wn.2d 795, 807, 108 P.3d 779 (2005). Upon a request for fees and costs under RCW 26.09.140, we consider “the parties’ relative ability to pay” and “the arguable merit of the issues raised on appeal.” *In re Marriage of Leslie*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998). The issues Feddema raised on appeal carried little merit and he does not prevail, thus we deny his request for attorney fees. We award reasonable attorney fees and costs to Le in defending this appeal upon compliance with RAP 18.1(c). RAP 1.2(c).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Van Deren, J.

We concur:

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Houghton, J.

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Quinn-Brintnall, C.J.